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SUPREME COURT OF THE UNITED STATES

TERM, A. D.

No. 71-1174

UNITED TRANSPORTATION UNION,
an unincorporated Labor Union, as representative of a class of operating railroad personnel,
Petitioner,

versus

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, a Kentucky Corporation and **SEABOARD COAST LINE RAILROAD COMPANY,** a Virginia Corporation, as Lessees of the railroad properties of Georgia Railroad and Banking Company, operating under the trade name of **GEORGIA RAILROAD,**
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1972

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UNITED TRANSPORTATION UNION,
an unincorporated Labor Union, as representative of a class of operating railroad personnel,
Petitioner,

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LOUISVILLE AND NASHVILLE RAILROAD COMPANY, a Kentucky Corporation and **SEABOARD COAST LINE RAILROAD COMPANY,** a Virginia Corporation, as Lessees of railroad properties of Georgia Railroad and Banking Company, operating under the trade name of **GEORGIA RAILROAD,**
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND APPENDIX.

To The Honorable Supreme Court of
The United States of America:

Petitioner respectfully petitions this Honorable Court to grant the Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in the above cause.

In this behalf Petitioner shows unto the Court:

I.

OPINION OF THE COURT BELOW.

UNITED TRANSPORTATION UNION, an Unincorporated Labor Union as Representative of a Class of Operating Railroad Personnel, Plaintiff-Appellant, v. Louisville and Nashville Railroad Company, et al, operating under the trade name of Georgia Railroad, Defendant-Appellee, 452 Fed. (2d) 226 (Fifth Circuit, 1971) affirming 323 F. Supp. 187 (N.D. Ga. 1971) (See page 6a Appendix).

II.

STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

Date of Judgment to be reviewed, December 14, 1971 (Appendix Page 6a).

Statutory provisions believed to confer on this court jurisdiction to review the judgment in question. 27 U. S. Code, § 1254 (1).

The rights, privileges and immunities here claimed arise under 45 United States Code, § 151, et seq.

III.

THE QUESTION PRESENTED FOR REVIEW.

The primary question presented for review is whether the proof presented on behalf of the Plaintiff-Appellant Union demanded a finding by the Trial Court that the Defendant-Appellee Railroad violated the status quo provision of the Railway Labor Act—45 USCA, § 152,

156 and 160, by making a change in the working conditions of the employees represented by the Plaintiff in abolishing certain train and crew assignments operating out of Augusta, Georgia and establishing new trains and crew assignments operating from Camak, Georgia, a distance of forty-seven miles from the original crew terminal.

The trial court held that the changes instituted by the Railroad were not such changes in working conditions prohibited by the Railway Labor Act and refused to grant an injunction maintaining the status quo (Appendix Page 4a).

The United States Court of Appeals for the Fifth Circuit affirmed (Appendix Page 6a).

1.

In January 1971 the Defendant Railroad posted a bulletin purporting to abolish certain crew assignments and establish new crew assignments with respect to four specific trains originally operating out of Augusta, Georgia. Under these changes, the crew assignments which were abolished involved trains which had a crew or home terminal in Augusta, and which operated from Augusta, Georgia to Macon, Georgia. The new crew assignments which were established provided for crew terminals and trains operating out of Camak, Georgia to Macon, Georgia; Camak being a small community some forty-seven miles from Augusta. This action was instituted by the Plaintiff Union after the postnig of the bulletin but prior to the effective date of the changes, praying for the temporary and permanent injunction prohibiting the change without first compliance with the administrative requirements of the Railway Labor Act.

2.

It was stipulated between the parties that on November 6, 1969 the Defendant Railroad served upon the Plaintiff Union certain proposals under Section Six of the Railway Labor Act, (45 USCA, § 156). The Railroad in its notice of November 6, 1969 proposed to:

> "establish a rule to provide that . . . the carrier shall have the right to establish, move, consolidate, and abolish the crew terminal. . . ."

These proposals of the Railroad and the original proposals by the Union were referred for national handling to the Railway Labor conference and the Southern Carriers committee and to the Union's National committee. A giving of the Section Six notices by the respective parties followed by their reference to the national organizations for handling, triggered the administrative procedure set out in the Railway Labor Act, and the status quo requirements prohibiting any unilateral action or self-help by any party. This was the situation at the time of the posting of the bulletin referred to above.

3.

The aforesaid facts having been introduced the following issues were presented:

a. Whether the Court below erred in finding that the new changes affected only the tie-up or lay-over point rather than a change of the home or crew terminal.

b. Whether the Court below erred in holding that the change in the crew terminal from Augusta, to Camak, Georgia did not involve a change in working

conditions proscribed by the status quo provisions of the Railway Labor Act.

c. Whether the Court below erred in finding that there was no prior dispute between the parties over the change of the crew terminal from Camak to Augusta.

d. Whether the Court below erred in denying the Union's request for a preliminary injunction where the railroad instituted a unilateral change in the working conditions (directly related to the subject matter of the Railroad's own Section Six notice for change in the working agreements between the parties.)

II

AUTHORITIES CITED.

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III.

STATUTES INVOLVED.

The statutes involved are: The Railway Labor Act 45 U.S.C. §150 et. seq.

IV.

STATEMENT OF THE CASE.

(a)
The Material Facts.

The petitioner herein is an unincorporated Labor Union representing firemen, trainmen, flagmen and other railway employees and is the bargaining agent pursuant to the terms of the Railway Labor Act for said employees of the Respondent.

The defendant, Georgia Railroad, is a Georgia Corporation, a common carrier engaged in interstate and intrastate commerce by railroad and is subject to the Laws of the United States in respect thereto. Petitioner brought an action for injunction in the United States District Court for the Northern District of Georgia, Atlanta Division, and sought to restrain and enjoin the Respondent from engaging in any wrongful and unlawful change of working conditions and rules.

The employees of the Respondent who were members of and represented by the Petitioner had entered contract with Respondent respecting wages, rules and working conditions. Copies of the two agreements involved here were introduced in evidence. At the time of the

filing of the complaint said agreements were of full force and effect. Said agreements provided that the home terminal for crews in unassigned service was Augusta, Georgia, and for crews in assigned service the layover or tie-up point. This is specified in the Conductor's Agreement in Addendum No. 5 and in the Trainmen's Agreement in Addendum No. 4.

On November 6, 1969 Respondent acknowledged receipt of Section Six Notices under the Railway Labor Act (Title 45, USCA, § 151, et seq.) from Petitioner's General Chairman and, in turn, served upon Petitioner Respondent's counter-proposals. Copy of said letter and the pertinent parts of defendant's Section Six Notices are included in the Appendix (Appendix Page 13a, 15a).

The Railroad, in its Notice of November 6, 1969, proposed to:

> ". . . establish a rule to provide that. . . the carrier shall have the right to establish, move, consolidate and abolish the crew terminal. . ."

Thereafter, because there were national issues involved in the proposal and counter-proposals, the issues were referred to national and regional offices for handling and conferences between the parties began. Letters authorizing the action are included in the Appendix (Appendix Page 14a and 17a). This action invoked administrative procedure set out in Chapter VIII of the Railway Labor Act and bound each party to maintain a status quo and refrain from unilateral action or self-help.

On January 17, 1971 the Respondent posted Bulletin No. TM-7 dated January 15, 1971 which bulletin sought to change the working conditions of the members of petitioning Union by changing the home terminal from

Augusta, Georgia to Camak, Georgia, some forty-seven miles away. The bulletin is part of the Appendix to this Petition (Appendix Page 18a).

The evidence presented on behalf of the Plaintiff Appellant showed without dispute that Camak, Georgia was a small community without overnight accommodations, without any restaurant open after three o'clock in the afternoon and without public transportation of any kind. There was, however, evidence that the Defendant-Railroad had attempted to alleviate this situation somewhat by installing in its new terminal in Camak, a Coca-Cola machine and a Peanut-butter cracker dispensing machine, No sleeping accommodations in the town were provided, although there was a rooming house available in an adjoining town.

The effect of the change was to cause the employees represented by Plaintiff to drive on their own time an additional forty-seven miles to report for work and an additional forty-seven miles to arrive home after being released from work than they were required to prior to the change in the crew terminal from Augusta to Camak. This activity on the part of the Defendant-Appellee Railroad was an attempt to change, the status quo in effect as a result of the proposed change submitted under Section Six of the Railway Labor Act quoted above in a unilateral manner, while the issues were in conference on a national level. This activity on the part of the Defendant-Appellee Railroad caused damage to the employees represented by the Plaintiff-Appellant and will continue to cause such damage unless restrained.

The members of the petitioning Union have complied in each and every respect with the obligations of the working agreement between the parties and the Respondent's arbitrary violation of the terms of the working agreement has resulted in inconvenience, expense and loss of income to Petitioner's members which continues up until the date of the filing of this Petition.

It was Plaintiff's contention that this was a major dispute; Respondent changing the working conditions and refusing to negotiate as provided by the Railway Labor Act. Further, it deprived Petitioner's members of the opportunity to avail themselves of the administrative provisions of the Railway Labor Act.

After hearing argument by both parties and submission of briefs, the District Judge on February 18, 1971 denied the relief sought by Plaintiff Union (Appendix Page 1a).

Plaintiff Union filed Notice of Appeal within the time provided by law and after submission of briefs and oral argument by the parties hereto, the Fifth Circuit Court of Appeals rendered its opinion affirming the trial Judge. (Appendix Page 6a).

V.

ARGUMENT AMPLIFYING REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The opinion of the trial court in this case and the affirmance of the trial court by the Fifth Circuit Court of Appeals defeats one of the primary purposes of the Railway Labor Act, 45 USCA, § 151 et seq. The Railway Labor Act was passed by Congress for the purpose of resolving major disputes between railroad employees and railroad management; to prevent strikes and other disruptions of interstate commerce. The Railway Labor

Act was designed to afford a solution to disputes between railroads and its employees and relieve the courts of some of the burden of litigation between parties to a dispute. The Act has provisions to protect both parties to disputes while a "major dispute" between Labor and Management is being resolved in accordance with the terms of the Act.

The protective provision of the Railway Labor Act which has application here is the status quo provision. When either or both parties serve on the other Section Six Notices under the terms of the Railway Labor Act (45 U.S.C. § 156), the Act provides that no changes can be made in the rules or working conditions until the administrative remedies have been employed by the parties and have resolved the issues.

The primary question in this case is whether the status quo was maintained by the respondent-railroad while the matters between the parties were being handled on a national basis under the terms of the Railway Labor Act. Petitioner says that it was not.

For many years the respondent's employees (who are affected by the railroad's unilateral change) lived in Augusta, Georgia and reported to work at Augusta, Georgia, their home terminal. On November 6, 1969 respondent, through its Director of Personnel, Mr. T. P. King, served upon the petitioning Union a Section Six Notice (Appendix 15a) the pertinent parts of which proposed to: "Establish a rule to provide that . . . the carrier shall have the right to establish, move, consolidate and abolish crew terminals. . ." By serving a Section Six Notice for national handling, the respondent acknowledged the fact that it did not have the right to "establish,

move, consolidate and abolish crew terminals. ..." However, on January 17, 1971, the respondent posted on the bulletin board Bulletin No. TM-7 dated January 15, 1971 (Appendix 18a) which bulletin sought to change the working conditions of the members of petitioning Union by changing the home terminal from Augusta, Georgia to Camak, Georgia, some forty-seven (47) miles away.

This action on the part of the respondent was an attempt to change the status quo of the parties while the disputed matter was in conference on a national level and this is contrary to the terms of the Railway Labor Act. It should be here noted that upon the hearing of this case in the U.S. District Court, defendant's witness, Assistant to General Manager and Director of Personnel, Mr. T. P. King testified questioned by Mr. Lewis on cross-examination:

Q: "Now you have stated, I believe, that you did want to negotiate with the Unions about your right, or the railroad's right, to change home terminals; is that correct?"

A: "That is correct, yes, sir."

Q: "And that is now before or is being handled nationally. Is that correct?"

A: "That is correct."

Q: "Alright, sir, now this Bulletin that Mr. Studdard put out, no matter what explanation for the terminology, it says the home terminal will be changed as of a certain date from Augusta, Georgia to Camak."

A: "That is right." (Record, Page 51-52)

And on Page 31 of the Record Mr. King testified:

Q: "Mr. King, so that after that change, I can be clear about what we are talking about. Is there any question about the terminology 'home terminal' when it is used in a railroad?"

A: "Absolutely not insofar as the carrier is concerned."

Q: "What is the home terminal of the Georgia Railroad?"

A: "Augusta, Georgia."

Q: "Has it ever been attempted to be changed?"

A: "Not until this Section Six Notice was served in the Fall of 1969."

Q: "Has any change been made in that until that Section Six Notice has been finally thrashed out and the final conclusion?"

A: "Absolutely not."

He also testified:

Q: "How many home points does the Georgia Railroad have?"

A: "Only one."

Q: "Has that changed?"

A: *"It cannot be changed except through a negotiation."* [Emphasis added]

The evidence before the trial court was that the home terminal could not be changed except by negotiations; the Railway Labor Act requires that status quo be maintained during negotiations; by serving the Section Six Notice asking for a determination of its right to change a home terminal or abolish a home terminal, the respondent admits that it did not have a right to make a change;

and in the face of the above on January 17, 1971 it posted a bulletin seeking to change the home terminal from Augusta, Georgia to Camak, Georgia. To require petitioning Union's members, Respondent's employees, to drive forty-seven miles home after work to Augusta, Georgia is very definitely a change in working conditions. The status quo was not maintained and the Respondent Railroad should have been enjoined by the District Court.

Section two, seventh, of the Railway Labor Act provides as follows:

> "No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in § 156 of this Title." 45 *USCA* § 152.

It was conceded by both parties that the existing working agreements make no specific provision either allowing or prohibiting the change of crew terminals by the Railroad. Apparently, the Court below took the same view as it finds no justification for the proposed changes in the existing agreements in the Order denying an injunction from which this Appeal is taken. Apparently, however, the Court below interpreted the change in the crew terminal of the four trains to be merely a schedule change and not a change in the working conditions. This finding was made in the face of the uncontested evidence that the crew terminals for the four designated trains had been Augusta since some period prior to the service of the Section Six Notice on November 6, 1969 and for some 30 years prior to that time according to the evidence of Mr. D. H. Dyches, General Chairman of the United Transportation Union for the Georgia Railroad.

Mr. T. P. King, the witness for the Railroad, testified that beginning in 1930, there had been isolated instances of utilization of Camak as a crew terminal, apparently as late as 1958, although Mr. King also testified that the Union had never consented to the change and there had been frequent disputes about the matter. There was a great deal of testimony concerning the terminology involved in the industry but the actual effects of the change were admitted and agreed to by both parties and these are:

(1) The train crews were required to report for duty at a point forty-seven miles from the original reporting point;

(2) The train crews were released from duty at a point forty-seven miles from the original release point;

(3) The new crew terminal was in a community of less than 100 persons vice a substantial city;

(4) The new crew terminal had no public transportation facilities available;

(5) The new crew terminal had no eating facilities available after 4:00 p.m. other than a Coca-Cola machine and a cracker dispensing machine;

(6) The new crew terminal had no sleeping accommodations available other than a rooming house in an adjoining town.

It is apparent that the effect of the contested bulletin abolishing the crew assignments in Augusta and establishing new crew assignments in Camak providing that the trains "will operate in this manner thereafter, with layover at Camak on Saturday, *with Camak being home*

terminal. . . ." was a change in the working conditions of the crews of these trains in violation of the status quo provisions of the Railway Labor Act.

The primary case relied on by the Union is that of the *Detroit and Toledo Shore Line Railroad Company v. United Transportation Union,* 396 U.S. 142, 90 S. Ct. 294 (1969). The facts in the "*Shore Line*" case are practically identical to those presented herein. The only difference is the terminology utilized to describe the facts rather than the facts themselves. In *Shore Line,* the Railroad attempted to establish outlying work assignments whereby the employees reported to certain outlying yards to begin work such as Trenton rather than at the yard in Toledo to which they had originally been reporting. The new assignment in Trenton would have required the employees to report for work at a point about 35 miles north of the original reporting place. In response to the change in work assignments made by the railroad, the Union filed a Notice under Section Six of the Railway Labor Act proposing an amendment to the collective bargaining agreement to cover the changed working conditions of the employees who would not work out of the terminal at Trenton (See 396 U.S. 145, 146).

It is apparent that this case presents a very similar situation with regard to the changing of work assignments from Augusta to Camak, or a distance of 47 miles, together with the change in the facilities and accommodations available at the new work point. Additionally, in the case sub judice, the Section Six Notice and the institution of the "major dispute" provisions were made by the Railroad itself rather than the Union. Certainly, a proposal to "establish a rule to provide that . . . the car-

rier shall have the right to establish, move, consolidate and abolish crew terminals . . . ." encompasses the particular change in working conditions which is made in the contested bulletin. The Union further has not attempted to use self-help by calling a strike but has brought the dispute to the District Court seeking an injunction requiring the Railroad to respect the status quo provisions of the Railway Labor Act. As pointed out by Justice Black:

> "The Act's status quo requirement is central to its design. Its immediate effect is to prevent the Union from striking and Management from doing anything that would justify a strike." (396 U.S. 150)

Justice Black examined in the *Shore Line* Opinion, the various status quo provisions of the Railway Labor Act and attempted to determine the intent of Congress in adopting them, and the particular facts to which they apply. The significant portion of the Opinion provides as follows:

(396 U.S. 152)

> "While the quoted language of §§ 5, 6, and 10 is not identical in each case, we believe that these provisions, together with § 2 First, form an integrated, harmonious scheme for preserving the status quo from the beginning of the major dispute through the final 30 day 'cooling off' period. Although these three provisions are applicable to different stages of the Act's procedures, the intent and effect of each is identical so far as defining and preserving the status quo is concerned. The obligation of both parties during a period in which any of the status quo provisions is properly invoked is to *preserve*

> *and maintain unchanged those actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose* and which are involved in or related to that dispute." (emphasis added).

It should certainly be clear that changing the place or terminal to which an employee reports to work and from which he is erleased from work by a distance of approximately 47 miles, and from a major city to a town of approximately 100 persons in which there are no or little public facilities or accommodations is certainly a change in the *actual, objective working conditions and practices.*

The real significance of the foregoing quote as applied to the case before this Court can best be understood by considering the comments of Justice Harlan with whom the Chief Justice joins as set out in the separate Opinion concurring in part and dissenting in part to the majority Opinion. Justice Harlan observes that the majority test is the "actual, objective working conditions." Justice Harlan objects to this test and rather favors a more subjective approach which would consider the whole context of the relationship between the patries in order to determine whether there is any basis for implying an understanding of the particular practice involved. (396 U.S. 159, 160).

Apparently the Railroad in this case is attempting to show a previous practice of making changes in the terminal between Augusta and Camak and back. They attempted to introduce evidence to show that the terminal has in fact been changed three times during the last forty years, although this evidence is in conflict with that of the Union as presented by Mr. Dyches. In the case sub

judice, however, there has been a history of disputes concerning the proposed changes of the crew terminal as evidenced by both the testimony of Mr. Dyches and Mr. King. Certainly, this testimony by both witnesses refutes the possibility that there had been previous changes in the crew terminal from Augusta to Camak with the knowledge and acquiescence of the Union so as to fall within the exception noted by Justice Black concerning prior practice. (396 U.S. 153, 154).

One point which was apparently overlooked by the lower court is particularly significant with regard to the determination of whether there has in fact been a change in working conditions. This fact is the candid explanation given by Mr. King fo rthe change in crew terminal from Augusta, some 47 miles down the line, to Camak. Mr. King testified in response to the question regarding the reason for the change as follows:

> "This time for several reasons. The most important is a recent change in the Federal Hours of Service Law enacted by Congress . . . which reduces the number of hours that train and engine service employees can remain on duty from 16 to 14 and on December 26, 1972 to 12 hours."

Mr. King acknowledges that in order for the Railroad to abide by the Federal Hours of Service Law, (PL 91-169, 83 STAT. 463), the change provided in the bulletin requires the train crews to drive an additional 47 miles to report to work and 47 miles after being released from work on their own time. This is not only a patent change in the working conditions of the men but is a patent attempt on the part of the Railroad to avoid the clear intent of Congress in enacting the Hours of Service Law.

The service of the proposals set out in the Section Six Notice which was attached to Plaintiff's Complaint instituted the administrative procedures provided for under the Railway Labor Act whereby disputes involving either the making or changing of labor agreements could be handled on a voluntary basis while still affording ample protection to the public by the use of the broadest possible status quo provisions. A concise statement of the Act's major dispute procedures and status quo requirements is set out in an Opinion by Mr. Justice Harlan, *Railroad Trainmen v. Terminal Company*, 394 U. S. 369, 378, 22 L. Ed. 2d 344, 354, 89 S.CT. 1109 (1969). The dispute in this case proceeded through the emergency board provisions ultimately resulting in a joint resolution of Congress extending the status quo provisions of §10 of the Railway Labor Act (45 USCA §160) for an additional period, so that no change, except by agreement, could be made by either the railroads or the carriers in the conditions out of which such dispute arose prior to March 1, 1971 and thus encompassing the period involved in this litigation. (H. J. Res. 1413, Public Law 91-541, 84 STAT. 1407).

The argument on behalf of Appellant can best be summed up by reference to Judge Ainsworth's dissenting opinion in the court below (452 F. 2d at 228):

> "In my view, the conclusion reached by the majority in this case defeats one of the central objectives of Congress in its passage of the Railway Labor Act (45 USCA, §151 et seq), namely, that the status quo be maintained between labor and management, the union and the railroad here, while a "major dispute" between the parties is being resolved in accordance with the terms of the Act . . . The railroad's unilateral

change of the home crew from Augusta to Camak, was a change in working conditions, not authorized by the collective bargaining agreement, and brought about a major dispute. The railroad's action thus violated the specific provision of the Railway Labor Act, Section 2, Seventh (45 USCA §152), Section 6 (45 USCA §156), and Section 10 (45 USCA §160), as extended by PL 91-541, 84 STAT. 1407. . . . Prior to the change of the home crew terminal, the parties had each served Section 6 (45 USCA §156) notices on the other relative to proposed changes in the agreements. One of the changes proposed by the railroad was one allowing it to move crew terminals, the identical issue involved here. Without waiting for a resolution of its proposal, the railroad went ahead and made the change on its own—unilaterally . . . This case is indistinguishable in principle from *Detroit & Toledo S.L.R. Co. v. United Transportation Union.*, 396 U.S. 142, 90 S.Ct. 294 (1969). It cannot be properly decided by trying to alter the fact—made abundantly clear by the record—that the change which the railroad made is a change of home crew terminals, not a mere designation of a new tie-up or layover point. In clear and unequivocal language, the railroad's bulletin of January 15, 1971, states that Camak will become "home terminal." Testimony of the railroad witness that this was mere "misnaming" is unconvincing and an attempt to obscure the real issue, when scrutinized in light of all the circumstances and past history of this recurring controversy. . . . Thus, the railroad's unilateral action, in face of its own Section 6 notice, should have been enjoined and the status quo maintained, until the orderly processes of the Railway Labor Act could have been allowed to function."

CONCLUSION

In conclusion it is respectfully submitted that the decision of the trial court and that of the court of appeals is in conflict with the prior decision of this Court in *Shore Line* and that therefore a review of Writ of Certiorari is appropriate on this important federal question involving the Railway Labor Act.

Respectfully submitted,

LEWIS, LEWIS, SPEARMAN & BYNUM

/s/
T. J. Lewis, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Petition for Certiorari upon counsel for opposing party, to-wit, RALPH G. McCALLUM, Jr., 310 Fulton Federal Building, Atlanta, Georgia 30303, by mailing three true and correct copies to him by United States Mail with adequate postage thereon.

This 11 day of March, 1972.

/s/

T. J. LEWIS, JR.

Suite 400 The Equitable Building
Atlanta, Georgia 30303

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

UNITED TRANSPORTATION UNION, an Unincorporated Labor Union, as Representative of a Class of Operating Railroad Personnel,

Plaintiff

vs. **CIVIL ACTION NO. 14652**

GEORGIA RAILROAD, a Georgia Corporation,

Defendant

ORDER DENYING PRELIMINARY INJUNCTION

(Filed: February 18, 1971)

This is a suit brought under the Railway Labor Act (Title 45, U.S.C. § 151 *et seq.*) seeking a preliminary injunction to enjoin an alleged unilateral change by defendant railroad in working conditions, contrary to 45 U.S.C. §156. The alleged change is said to consist in moving the home terminal of members of plaintiff from Augusta to Camak, Georgia.

No temporary restraining order was issued following the hearing on January 22, 1971, upon defendant's undertaking, in the event of a subsequent adverse order, to "roll back" to the *status quo ante*.

By Bulletin dated January 15, 1971, defendant purported to abolish the crew assignments for trains 30 and 31, 50 and 51, and establish effective January 24, 1971, new train schedules and crew assignments under which Camak would be the "home" terminal for the crews. A new local freight schedule operating between Augusta and Camak would also be established.

Plaintiff claims that said changes constitute a change in the *status quo* contrary to 45 U.S.C. § 156.

There is presently pending at the national level negotiations between the plaintiff union, and other unions representing railroad employees on the one hand, and defendant railroad, and other railroads on the other hand, over rates of pay, rules and working conditions. One of the proposals by the railroads, including defendant, in said negotiations is to "establish a rule to provide that . . . the carrier shall have the right to establish, move, consolidate and abolish crew terminals . . ." Those negotiations are subject to H.J.R. 1413 which provides that "the final paragraph of § 10 of the Railway Labor Act (45 U.S.C. § 160) shall apply and be extended for an additional period with respect to the above dispute so that no change, except by agreement, shall be made by the carriers represented by the National Railway Labor Conference and the Eastern, Western and Southeastern Carriers Conference Committees, or by their employees, in the conditions out of which such dispute arose prior to 12:01 antemeridian of March 1, 1971."

It is the plaintiff's position that the change by defendant amounts to a change in the conditions out of which the national dispute arose and is prohibited (45 U.S.C. § 156) as modified by H.J.R. 1413.

The defendant takes the position that the change is not a change in the conditions out of which the dispute now in negotiations arose, but is, in effect, a mere application of crew assignment rules in effect for many years.

The railroad claims that the only effect on it of rights sought under the national proposal would be to change its present conceded "home" terminal from Augusta to some other point, if it so desired, the "home" terminal signifying, according to the evidence before the Court, the point from which the railroad must pay extra, or unassigned, employees to and from their work assignments.

In this connection, it was conceded by the plaintiff at the hearing that, with respect to all crews in an unassigned service, Augusta is the home terminal and Macon and Atlanta are the away from home terminals, *but for assigned crews the terminal is the tie-up or layover point.* It was further conceded that the only changes under consideration here involve assigned crews. Under the new schedules for trains 30 and 31, 50 and 51, here involved, Camak became the tie-up or layover point.

The case is before the Court on motion for preliminary injunction, and while it is not necessary for plaintiff to prove its case at this point, there must be showing that there is a probability of ultimate success. *King v. Saddleback Junior College,* 425 F.2d 426 (9th Cir. 1970).

See also, District 50 U.M.W. v. International U, U.M.W., 412 F.2d 165 (D.C. Cir 1969). The decision of whether to grant or deny preliminary injunction in this case is also tempered by the negotiations being carried on pursuant to H.J.R. 1413, *supra*, since any agreement reached thereunder might be dispositive of this case.

Were it not for the broadness of defendant's November 6, 1969, § 6 counter-proposal, the Court would have no hesitation in holding that the question here is simply one of the application of a conceded formula. The notice involved was broad enough to embrace the problem before the Court today, but went beyond any "disputes" which the evidence showed may have existed between the parties.

As pointed out by Chief Judge Smith in *United Transportation Union v. Atlanta and West Point Railroad Company*, Civil Action No. 14520 in this Court (Order of January 6, 1971), the case of *Detroit & Toledo Shore Line Railroad Company v. Union Transportation Union*, 396 U.S. 142 (1969), relied upon heavily by plaintiffs here as in that case, is distinguishable in that in the *Shore Line* case the subject matter of the change involved an unresolved and disputed issue between the union and the railroad. Here the evidence does not reveal any prior dispute between the union and the railroad over the question of the designation of the tie-up or layover point as the terminal for assigned crews.

Believing that the schedule change involved here does not involve a change in the working conditions which presently is the subject matter of national handling, and further that no irreparable injury will occur to plaintiff or those it represents if a preliminary injunction is

denied, the plaintiff's request for preliminary injunction is hereby denied.

This 18th day of February, 1971.

s/ Charles A. Moye, Jr.
UNITED STATES DISTRICT JUDGE

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1925

UNITED TRANSPORTATION UNION,
an Unincorporated Labor Union,
as Representative of a Class of
Operating Railroad Personnel,
Plaintiff-Appellant,

versus

GEORGIA RAILROAD,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

(December 14, 1971)

Before BELL, AINSWORTH, and GODBOLD, Circuit Judges.

BELL, Circuit Judge: This action was brought by the United Transportation Union under the Railway Labor Act, 45 USCA § 151 et seq., seeking a preliminary injunction to enjoin an alleged unilateral change in working conditions by the Georgia Railroad in violation of the status quo provisions of the Act, 45 USCA §§ 156,

160. The district court denied the injunction on the basis that the change involved did not constitute a change in working conditions subject to the status quo provisions of the Act. We agree.

In January 1971, the railroad posted a bulletin purporting to abolish certain crew assignments and establishing new crew assignments with respect to specified trains. Under these changes, insofar as they are in question here, the terminal for the two operating crews would be moved from Augusta, Georgia to Camak, Georgia — a distance of 47 miles. The crews had been assigned to trains Nos. 30 and 31 which operated between Augusta, Georgia and Macon, Georgia. As changed, the trains would operate only between Camak, an intervening point, and Macon.

The issue involved is complicated by the fact that the parties to this suit are involved in negotiations at the national level between carriers represented by the National Railway Labor Conference and the Eastern, Western, and Southeastern Carriers Conference Committees and certain of their employees represented by plaintiff union and other employee unions.

In October 1969, the "major disputes" settlement provisions of the Railway Labor Act were set into operation when plaintiff union notified the Georgia Railroad through a § 6 notice, 45 USCA § 156, of intended changes in agreements affecting rates of pay, rules, and working conditions. The railroad made § 6 counter-proposals, including one to "Establish a rule to provide that . . . the carrier shall have the right to establish, move, consolidate, and abolish crew terminals. . . ." Since these notices involved issues already pending in national nego-

tiations, the matters asserted in the notices were referred for national handing by the parties.

It developed that the emergency board appointed pursuant to 45 USCA § 160 was unable to effect a settlement on the pending issues within the 30 day period provided for in § 10 of the Railway Labor Act, 45 USCA § 160, and Congress responded with the passage of Public Law 91-541, 84 Stat. 1407 (Dec. 9, 1970), which extended the status quo provisions of § 10 with respect to the dispute. Thus, no changes could be made by the parties to the controversy "in the conditions out of which the dispute arose". 45 USCA § 160 as modified by Public Law 91-541, supra. *See* 1 U.S. Code Cong. & Admin. News 1641 (1970); 3 U.S. Code Cong. & Admin. News 4879 (1970).

The primary argument urged by the union on this appeal is that the relocation of crew terminals from Augusta to Camak constitutes a change in working conditions contrary to the provisions of § 10, supra, as extended by Public Law 91-541. In support of this argument, the union maintains that the railroad's own § 6 notice of November 1969 indicates that the location of crew terminals was one of the working conditions intended to be changed and therefore subject to the status quo provisions of the act. The union thus urges that the district court erred in failing to enjoin the proposed change in crew terminals from Augusta to Camak.

The district court pointed out that the railroad's notice in literal terms was broad enough to embrace the work assignments in question. However, the substance of the court's findings was that the notice, in view of undisputed past work assignment practices, was not to be construed to include the subject matter of terminals for assigned crews as distinguished from unassigned crews.

We conclude from a careful examination of the record that the district court was not in error. It was conceded by the union that for assigned crews the terminal is the tie-up or layover point and that the changes involved here involve only assigned crews. The record further reflects a long practice of moving the tie-up or layover point for crews from time to time from Camak to Augusta and Augusta to Camak.

It is fair to say, however, that the employees were never pleased with Camak as a terminal point but the railroad, nevertheless, on occasion used it as a tie-up or layover point. The union points out in its complaint that the working agreements between the parties provide that "the home terminal for crews in unassigned service shall be Augusta, and for crews in assigned service the layover or tie-up point is their terminal." The crews in issue are in assigned service and it is undisputed that Camak under the circumstances presented is a layover or tie-up point.

We conclude that there is ample evidence to indicate that the designation of tie-up or layover points as the terminal for assigned crews was not a subject of prior dispute between the union and the railroad but was a matter reserved by practice if not by contract to the railroad. It was therefore not included in the railroad's § 6 notice of November 1969.

The union's reliance upon *Detroit & Toledo Shore Line Railroad Co. v. United Transportation Union*, 1969, 396 U.S. 142, 90 S.Ct. 294, 24 L.Ed.2d 325, in asserting a contrary position is misplaced. Granted, the facts of *Shore Line* are similar to those presented here, but with some important exceptions. In that case, the court noted

that "the railroad's establishment of the [outlying] assignments arose at a time when actual working conditions did not include such assignments." 396 U.S. at 154. Furthermore, the assignments in *Shore Line* had not "occurred for a sufficient period of time with the knowledge and acquiescence of the employees to become in reality a part of the actual working conditions." Id. The record here is to the contrary. See *Detroit & Toledo Shore Line Railroad Co. v. United Transportation Union*, supra, 396 U.S. at 154; cf. *United Transportation Union v. St. Paul Union Depot Co.*, 8 Cir. 1970, 434 F.2d 220, *cert. denied*, 401 U.S. 975, S.Ct. , 28 L.Ed. 2d 324.

We conclude that since the change involved in this case is not embraced by the Railroad's § 6 notice of November 1969, the district court did not err in denying the injunction.

AFFIRMED.

AINSWORTH, Circuit Judge, dissenting:

In my view, the conclusion reached by the majority in this case defeats one of the central objectives of Congress in its passage of the Railway Labor Act (45 U.S.C. § 151 et seq.), namely, that the status quo be maintained between labor and management, the union and the railroad here, while a "major dispute" between the parties is being resolved in accordance with the terms of the Act.

There has been a long history of strife and dispute between the union and the railroad about the latter's attempt to change the home crew terminal from Augusta to Camak, a distance of 47 miles. The crews live in Augusta, the home terminal. They must, therefore, drive 47 miles to work, and 47 miles back home. Camak is a

community of approximately 100 people — there is no public transportation available, no rooming house or motel, with a single cafe which is open only 8 hours per day, closing at 4 p.m. There is a Coca Cola machine and a cracker and candy bar machine in the agent's office.

The railroad's unilateral change of the home crew terminal from Augusta to Camak, was a change in working conditions, not authorized by the collective bargaining agreement, and brought about a major dispute. The railroad's action thus violated the specific provision of the Railway Labor Act, Section 2, Seventh (45 U.S.C. § 152), Section 6 (45 U.S.C. § 156), and Section 10 (45 U.S.C. § 160), as extended by PL 91-541, 84 Stat. 1407.

Prior to the change of home crew terminal, the parties had each served Section 6 (45 U.S.C. § 156) notices on the other relative to proposed changes in the agreements. One of the changes proposed by the railroad was one allowing it to move crew terminals, the identical issue involved here. Without waiting for a resolution of its proposal, the railroad went ahead and made the change on its own — unilaterally.

This case is indistinguishable in principle from *Detroit & Toledo S. L. R. Co. v. United Transp. U.*, 396 U. S. 142, 90 S. Ct. 294 (1969). It cannot properly be decided by trying to alter the fact — made abundantly clear by the record — that the change which the railroad made is a change of home crew terminals, not a mere designation of a new tie-up or layover point. In clear and unequivocal language, the railroad's bulletin of January 15, 1971, states that Camak will become "home terminal." Testimony of the railroad witness that this was mere "misnaming" is unconvincing and an attempt to obscure the

real issue, when scrutinized in light of all the circumstances and past history of this recurring controversy.

Thus, the railroad's unilateral action, in the face of its own Section 6 notice, should have been enjoined and the status quo maintained, until the orderly processes of the Railway Labor Act could have been allowed to function.

I would reverse and remand for entry of an appropriate order restoring the status quo. I, therefore, dissent.

ATLANTA AND WEST POINT RAILROAD COMPANY
THE WESTERN RAILWAY OF ALABAMA
GEORGIA RAILROAD
ATLANTA JOINT TERMINALS

November 6, 1969

Mr. D. H. Dyches, General Chairman
United Transportation Union (T) (GaRR)
1836 Hampton Avenue
Augusta, Georgia 30904

Dear Sir:

Reference is made to your letter of October 20, 1969, purporting to be a Section 6 notice under the Railway Labor Act, as amended, of your desire to change agreements affecting rates of pay, rules or working conditions, to the extent indicated in Attachment 1. Reference is also made to Carrier's acknowledgment thereto dated October 29, 1969, in which Carrier reserved the right, among other things, to serve such proposals as it may consider appropriate for concurrent handling with your proposals.

Attached served pursuant to Section 6 of said Railway Labor Act, are Carrier's counterproposals identified as (UTU) Attachment A for concurrent handling with your proposals.

Both carrier and organization proposals will be discussed in our forthcoming conference on Friday, November 14, 1969, at 2:00 p.m.

Kindly acknowledge receipt and understanding.

Yours very truly,

Exhibit "A"

ATLANTA AND WEST POINT RAILROAD COMPANY
THE WESTERN RAILWAY OF ALABAMA
GEORGIA RAILROAD
ATLANTA JOINT TERMINALS

April 3, 1970

Mr. D. H. Dyches, General Chairman
United Transportation Union (T&C) (GaRR)

Mr. S. H. Saggus, General Chairman
United Transportation Union (T) (A&WP-WofA)

Mr. T. F. Carr, General Chairman
United Transportation Union (E) (A&WP-WofA)

Mr. E. J. Whitley, Jr., General Chairman
United Transportation Union (T&E) (AJT)

Gentlemen:

Further reference is made to mine of December 4, 1969, concerning your Section 6 notice of October 20, 1969, our notice of November 6, 1969 and your further notice of November 20, 1969, dealing with rates of pay, rules and working conditions.

The purpose of this letter is to advise that because of the national issues involved, Carrier has authorized the National Railway Labor Conference, J. P. Hiltz, Jr., Chairman, together with the Southeastern Carrier's Conference Committee, W. S. Macgill, Chairman, 1225 Connecticut Avenue, N.W., Washington, D.C., to represent these lines in the concerted handling of this matter.

Yours very truly,

Exhibit "B"

Attachment A

A. Establish a rule to provide that

1. Engine, train, and yard service employees shall be paid at the minimum standard hourly rate of the class of service involved for hours actually worked from the time called to report for duty until released from duty at the end of the tour of duty, except that in freight and yard service hours worked in excess of eight during a single tour of duty shall be paid for on a minute basis at 1-1/2 times the minimum standard hourly rate.

2. All agreements, rules, regulations, interpretations and practices, however established, which provide for higher than standard rates, arbitraries or special allowances, daily, weekly, monthly or other minimum or guarantees, graduated rates of pay based on weight on drivers or on the maximum number of cars hauled, mileage rates, or which otherwise conflict with the provisions of paragraph 1 of this rule shall be eliminated; and no employee shall receive any other or additional compensation for any service performed during his tour of duty.

3. All agreements, rules, regulations, interpretations and practices, however established, which impose restrictions on weekly, monthly or annual earnings through the limitation of miles run or paid for, hours worked or paid for, or compensation received, shall be eliminated.

B. Establish a rule to provide that

1. The carrier shall have the right to establish, move, consolidate and abolish crew terminals, to merge and consolidate seniority districts and to establish interdivisional, interseniority district, intradivisonal and intraseniority district runs in assigned and unassigned (including extra) service, on either a one way or turnaround

(including short turnaround) basis and through established crew terminals. The right to operate such runs as may be established under the provisions of this rule will be free of the imposition of any restrictions as to class of traffic which may be handled or as to the origin or destination of any empty or loaded cars moving on such runs.

2. No rule, regulation, interpretation or practice, however established, shall be construed to in any way prohibit, restrict or limit the provisions of paragraph 1 of this rule.

C. Establish a rule to provide that

1. Passenger crews will perform any and all switching and station work in connection with the cars of their own trains as may be required of them at their initial and final terminals and at all intermediate points, including the clearing of any track or tracks and the shoving and coupling of cars on any track for the purpose of handling the cars of their own trains, and the handling of the light engine or engines of their own trains; and in the performance of such work will

UNITED TRANSPORTATION UNION
General Committee of Adjustment
GEORGIA RAILROAD

April 4, 1970

Mr. T. P. King, Director of Personnel
Georgia Railroad
4 Hunter Street, S.E.
Atlanta, Georgia 30303

Dear Sir:

Reference is made to yours dated April 3, 1970, concerning our Section 6 notice of October 20, 1969, your notice of November 6, 1969 and our further notice of November 20, 1969, dealing with rates of pay, rules and working conditions.

In yours of April 3, 1970, you advise that because of the national issues involved, Carrier has authorized the National Railway Labor Conference, J. P. Hiltz, Jr., Chairman, together with the Southeastern Carrier's Conference Committee, W. S. Macgill, Chairman, 1225 Connecticut Avenue, N.W., Washington, D.C., to represent the Georgia Railroad in the concerted handling of this matter.

This will serve to acknowledge the above and to advise you that we have referred this matter to our National Conference Committee, Charles Luna, President, 15401 Detroit Ave., Cleveland, Ohio, to represent us in the concerted handling of this matter.

Kindly acknowledge receipt of this letter.

Yours very truly,

D. H. Dyches, Sr., General Chairman
cc: Mr. Charles Luna, President
United Transportation Union

Exhibit "C"

GEORGIA RAILROAD

BULLETIN

TM-7

Augusta, Ga., January 15, 1971

ALL CONCERNED:

Effective with arrival of train No. 30 at Augusta Friday January 22, 1971, and arrival of train No. 30 at Augusta Saturday January 23, 1971, the crew assignments of trains 30 & 31 will be abolished.

Effective with arrival of train No. 50 at Augusta Friday January 22, 1971, and arrival of train No. 50 at Augusta Saturday January 23, 1971, the crew assignments of trains 50 and 51 will be abolished.

Effective 12:01 A.M. Sunday January 24, 1971, two crews will be assigned to operate trains 30 and 31 between Camak and Macon on 6 day basis, performing local work at Camak and between Camak and Macon, including making side trips to Plant Harllee Branch with assigned mileage of 106 miles for train No. 31 and 103 miles for train No. 30.

First crew on duty at Camak train No. 31 9:01 A.M. to depart Camak on No. 31's schedule, or extra, Sunday, January 24, 1971, returning on No. 30's schedule, or extra, from Macon to Camak Monday, January 25, 1971, and will operate in this manner thereafter, *with layover at Camak on Saturday with Camak being home terminal.* The above is the assigned mileage; however, when the crew is required to work Camak Quarry, they will be paid an additional eight (8) miles for each trip to quarry as per present schedule agreement.

Second crew on duty Camak train No. 31 9:01 A.M. to depart on No. 31's schedule, or extra, Monday January 25, 1971, operating in the same manner as described above for first crew and will operate in this manner thereafter, *with layover at Camak on Sunday with Camak being the home terminal.*

Effective 12:01 A.M. Sunday, January 24, 1971, two crews will be assigned to operate trains 50 and 51 between Augusta and Athens on 6 day basis, performing local switching as directed between these points with trains No. 50 and 51 making side trip to Washington as instructed with assigned mileage of 152 miles.

First crew on duty Harrisonville, train No. 51, 7:00 A.M. to depart on No. 51's schedule, or extra, Sunday January 24, 1971, returning on No. 50's schedule, or extra, on duty 9:30 A.M. depart Athens 10:00 A.M., operating to Harrisonville Monday January 25, 1971, and will operate in this manner thereafter, laying over at Augusta on Saturday with Augusta as home terminal. The above is the assigned mileage; however, when the crew is required to work Camak Quarry, they will be paid and additional eight (8) miles for each trip to quarry as per current agreement.

Exhibit "D"

Bulletin 2

1-15-71

Second crew on duty Harrisonville, train No. 51, 7:00 A.M. to depart on No. 51's schedule, or extra, Monday January 25, 1971, operating on the same manner as described above for first crew and will operate in this manner thereafter, laying over at Augusta on Sunday with Augusta as home terminal.

Effective Monday January 25, 1971, a local freight operating as Extra or Work Extra, known as Augusta—Camak turn around will be established going on duty Harrisonville 8:30 A.M. and perform switching service between these limits, making short turn arounds as instructed. This assignment will turn back eastward at mile post 41 chip mill unless otherwise instructed and will be assigned to operate Monday through Saturday with layover and home terminal at Augusta.

One Conductor, engineer and two trainmen and a fireman (blankable position) will be assigned to each of the above runs in regular bulletin 9:00 A.M. January 22, 1971.

R. N. Studdard, Trainmaster

Post: All Bulletin Boards

Cys: Mr. A. C. Jones, Jr.
Mr. T. P. King
Mr. J. L. Wilson
Mr. J. E. Bradshaw
Mr. C. G. Horn
Mr. J. C. Barton
Mr. J. M. Clontz
Mr. D. H. Dyches
Caller-Clerks

APPENDIX B

RAILWAY LABOR ACT

§152 Seventh. *Change in pay, rules, or working conditions contrary to agreement or to section 156 forbidden.*

No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

§156. *Procedure in changing rates of pay, rules, and working conditions.*

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

PUBLIC LAW 91-541; 84 STAT. 1407

[H. J. Res. 1413]

§ 1.

The provisions of the final paragraph of section 10 of the Railway Labor Act (45 U.S.C. 160) shall apply and be extended for an additional period with respect to the above dispute, so that no change, except by agreement, shall be made by the carriers represented by the National Railway Labor Conference and the Eastern, Western, and Southeastern Carriers Conference Committees or by their employees, in the conditions out of which such dispute arose prior to 12:01 antemeridian of March 1, 1971.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1174

UNITED TRANSPORTATION UNION, an Unincorporated Labor Union,
Petitioner,

vs.

GEORGIA RAILROAD, the Trade Name of the Louisville & Nashville Railroad Company and Seaboard Coast Line Railroad Company, as Lessees of the Properties of Georgia Railroad and Banking Company,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The statement in the Petition on this subject is adequate.

JURISDICTION

The jurisdictional statement in the Petition is adequate.

QUESTIONS PRESENTED

We would respectfully differ from the phraseology of the question as presented by the Union in its application for certiorari. This application being one for review of an opinion by the United States Court of Appeals for the Fifth Circuit affirming a denial by the District Court of a requested preliminary injunction, we believe the true legal question more properly is:

> Whether the District Court has abused its discretion in denying a preliminary injunction to a union which sought to prevent the railroad from modifying its schedule by abolishing certain train and crew assignments and replacing them with other train and crew assignments.

Since the District Court held that:

(a) the schedule change involved did not involve a change in any working conditions which were then currently the subject of any negotiations under the railway labor act (and thus the status quo provisions of the Railway Labor Act did not apply), and

(b) no irreparable injury would occur to the plaintiff, and its members, if a preliminary injunction were denied, the ultimate question is thus whether the evidence demanded a contrary ruling on not just one, but on both grounds.

STATUTES INVOLVED

This case involves the Railway Labor Act, particularly §§ 6 and 10, 44 Stat. 582, as amended, 48 Stat. 1197 (45 U.S.C.A., §§ 156, 160).

STATEMENT

A. Procedural History.

A complaint was filed in this case on January 21, 1971 and served on the railroad the same day. On that same day, a hearing was scheduled for the afternoon of the 22nd of January, the very next day, on the request for a preliminary injunction. The hearing on the 22nd was relatively brief, due to the fact that it was the occasion of the funeral of Senator Richard B. Russell, and that day was considered as a partial federal court holiday in Georgia. Nevertheless, each side put up one witness and several documents were introduced.

At the close of the evidence, the Court indicated that if the union wished to have a temporary restraining order issued to prevent the schedule changes from being put into effect while the Court took the matter under advisement, further evidence would be necessary in order to establish the amount of an appropriate bond to be posted by the union. At that point, most significantly, the union indicated that it could do without a temporary restraining order under those circumstances, and thus the schedule changes went into effect. (The railroad had indicated that it would comply with whatever order the Court were to issue in the matter, without regard to whether the "status quo" was the status quo as of the date of the order or the status quo as of the date of the hearing.)

An order was subsequently issued denying the preliminary injunction, which order was appealed to the Court of Appeals for the Fifth Circuit. After an affirmance by that Court, this Application for Certiorari was brought. Since that one brief hearing more than a year ago, no further action has taken place in the district court.

B. **General Background of the Dispute.**

Since a key element in the union's position consists of a notice served under the Railway Labor Act by this railroad two and one-half years ago, long before this dispute arose, it is not inappropriate at this point to summarize this incident. On October 20, 1969, a notice was sent to the railroad by the local General Chairman of the United Transportation Union on this railroad, which constituted a notice under § 6 of the Railway Labor Act of the union's desire to change its contract with the railroad in numerous areas not pertinent to this dispute. On November 6, 1969, as part of a coordinated national strategy designed to bring to a head the so-called "work-rules" dispute with the operating unions, this railroad, along with more than a hundred others throughout the country, served a lengthy package of counter-proposals. Because the individual railroads are the contracting parties, these notices were served individually by each railroad, but were shortly thereafter, in accord with normal bargaining procedures in such matters, referred to the National Railway Labor Conference and the Southeastern Carriers Conference Committee for national concerted handling.

Thereafter, no agreement was reached, a Presidential Emergency Board was established, and finally Congress extended by statute the § 10 freeze on working conditions in dispute until March 1, 1971. See P.L. 91-541; H.R. No. 91-1686 (3 U.S.C.C.A.N. 4879 [1970]). It is not in the record, but the UTU finally ratified the agreement in January 1972 after a long delay and the work-rules dispute is now over, at least for the time being.

To the extent the union's claim rests upon the Section 6 notice at all, and thus upon the status quo provisions of Sections 6 and 10, the dispute is now surely moot, since, as noted, the work rules dispute has been settled by agreement and there are no Section 6 notices outstanding involved in this case.

C. The Actual Dispute on the Georgia Railroad.

The Georgia Railroad has essentially a Y-shaped route structure, with the terminal points being Macon, Augusta and Atlanta. The junction point of these lines is a place called Camak, a small town about two miles from a nearby county seat. Camak itself is essentially nothing more than a town which exists because of the proximity of the railroad switching yard there. Although the union representative maintained that to the extent of his own knowledge, local freight trains from Macon had not tied up or ended their run at Camak since the late 1940's, the railroad's witness and documentary evidence introduced in the form of schedules and timetables showed that Macon branch trains had tied up at Camak at various times during the 1950's and during the 1960's as well. In addition, the attention of the trial court and of the Court of Appeals were directed to Award No. 13372 of the First Division of the National Railroad Adjustment Board which dealt with a dispute which arose in 1947 over the **abolition** of Camak as an end-point for the Macon run, which award recounted the long history of Camak as a junction point. That award held that under the then existing contract, the railroad did have the right to move the terminal point from Camak to Augusta, if it so chose.

In accord with what had by then become relatively well-established practices, on January 17, 1971, the railroad posted a notice that effective on January 22 and January 23, 1971, the Augusta-Macon trains and crew assignments would be abolished and a new train from Macon to Camak would be established. New crew assignments were to be made for the new run. (The contracts, which were introduced, provided that men could bid on new jobs in order of their seniority, in accord with established rules on this railroad.) It was this change which the union sought to prevent by the issuance of the preliminary injunction.

ARGUMENT

The petition for certiorari should be denied for one very simple and cogent reason: It absolutely fails to set forth any single legitimate ground as to why certiorari should be granted. That burden being upon the petitioner, and it having failed to carry it, there is no reason why this Court should occupy itself with this case and delay still further the possibility of allowing the parties a full and final resolution of the matter by trial in the District Court.

To summarize these deficiencies, very briefly, petitioner has shown absolutely no conflict between any courts in interpreting the relevant statute and case law. As a matter of fact, the Courts of Appeals of four circuits have now had occasion to consider and apply the holding and implications of **Detroit and Toledo Shoreline R.R. v. United Transportation Union**, 396 U.S. 142, 24 L. Ed. 2d 325, 90 S. Ct. 294 (1969), upon which the union relies (as well as the railroad), and none of the holdings of these Courts, much less the one in question here from the Fifth Circuit, are in conflict either with each other or in conflict with the holding of this Court. Indeed, the District Court and the Court of Appeals in this case have expressly considered **Shoreline** in making their rulings, as the record shows.

Petitioner itself acknowledges that the only question in this case is the correctness of the judgment made by the District Court in evaluating and weighing evidence presented in a very hasty and abbreviated hearing upon the question of whether or not to grant a preliminary injunction. The standard set by this Court in such matters is so well known that it can almost be recited by heart:

> "The award of an interlocutory injunction by courts of equity has never been regarded as strictly a matter of right; even though irreparable injury may other-

wise result to the plaintiff. . . . Even in suits in which only private interests are involved the award is a matter of sound judicial discretion, in the exercise of which the court balances the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction. Meccano, Ltd. v. John Wanamaker, 253 US 136, 141, 40 S Ct 463, 64 L ed 822; Rice & Adams Corp. v. Lathrop, 278 US 509, 514, 49 S Ct 220, 73 L ed 480. And it will avoid such inconvenience and injury so far as may be, by attaching conditions to the award, such as the requirement of an injunction bond conditioned upon payment of any damage caused by the injunction if the plaintiff's contentions are not sustained. Prendergast v. New York Te. Co., 262 US 43, 51, 43 S Ct 466, 67 L ed 853; Ohio Oil Co. v. Conway, 279 US 813, 815, 49 S Ct 256, 73 L ed 972." **Yakus v. United States**, 321 US 414, 440, 64 S Ct 660, 88 L ed 834 (1944).

The process by which a district judge arrives at a decision in such cases was well summarized by Judge Bazelon of the Court of Appeals for the District of Columbia as follows:

"When a motion for preliminary injunction is presented to a court in advance of hearing on the merits, it is called upon to exercise its discretion upon the basis of a series of estimates: the relative importance of the rights asserted and the acts sought to be enjoined, the irreparable nature of the injury allegedly flowing from denial of preliminary relief, the probability of the ultimate success or failure of the suit, the balancing of damage and convenience generally. A mere listing of the guiding considerations demonstrate their intangible nature, especially when no attempt is made at this stage to decide finally the ques-

tions raised." **Perry v. Perry,** 190 F. 2d 601 at 602 (1951).

It may be useful to present in summary form the issues before the District Court in this case with reference to those considerations. To the extent that the union initially based its claim to a preliminary injunction upon the concept that there would be some **irreparable** injury to its members from moving the crew terminal for two trains from Augusta to Camak, it fairly well obliterated its own position in the following interchange:

"The Court: All right. Then I need to get to the procedure we are going to follow. I assume you all want me to read the cases and make a decision on it. That is going to take some time. The weekend is going to pass before that happens. Now Mr. Major, I assume that there is no question that if I should enter a temporary injunction sometime after these changes are made that there is no question that the schedule would have to go back into effect. If not, then we need, it poses a question of whether we need a medial—right now pending decision.

"Mr. Major: Your Honor, we will roll back to comply with whatever the court rules. I wouldn't question your right to make us roll back.

"The Court: That applies to both. If I do that, that implies certain benefits with respect to the employees. I don't know what they may be.

"Mr. Major: Yes, sir, that would. I don't know what they might be.

"Mr. Lewis: Do I understand the court to mean that if, that it would allow these changes to go into effect as of tomorrow and then if you rule in favor of the union——

"The Court: That is what I am inquiring. It seems to me I have the alternative or else putting on evi-

dence as to the economic cost to the railroad, making you put a bond.

"Mr. Lewis: Yes, sir. Since Mr. Major said they will comply with the order and roll back, or however it was expressed, then we will go that route."

If, to the extent any employee was inconvenienced (which we will come to in a moment) by the change from Augusta to Camak, and that inconvenience was alleged to represent an irreparable injury, that position is difficult to square with the union's obvious willing acceptance of a "little" irreparable injury as an alternative to another fifteen minutes of testimony. Nor does it square with an apparently tacit agreement that if the railroad was in error in changing the schedule, then the men could be adequately financially compensated. Nor was the Court in a position to place much weight on the union's ultimate likelihood of success when the union was apparently unwilling itself to risk exposure to a counterclaim from the railroad if the union's claim turned out to be unfounded.

Further, while the union here has cleverly tried to create the impression of battalions of employees driving about the Georgia countryside in search of their "home terminal", respondents know of no statement they can legitimately make other than that the evidence contains no foundation for the assertion repeatedly made by the petitioner in its application that the effect of the change was to cause the employees represented by plaintiff to drive on their own time an additional 47 miles to report for work and an additional 47 miles to arrive home after being released from work than they were required to prior to the change in the crew terminal from Augusta to Camak. There is simply not one shred of evidence in the record as to where the new crews which were to go on duty with the schedule change lived, and absolutely no evidence as to where the old crews lived. Forty-seven miles is the distance from the center of Augusta to the center of Camak

(by railroad) but that is the only evidence in the record. Petitioner may wish he had put some evidence in the record on this point, assuming he had some, but there simply is none to be seen.[1] To be sure the dissenting judge in the Fifth Circuit Court of Appeals even recited this contention as a "fact" in his opinion, but there is no such "fact" in the evidence. Undoubtedly he relied upon such statements in the brief in that court, rather than the record. All this is merely illustrative of the evidence that the district judge properly exercised his discretion upon the limited evidence in front of him and found that the union had not shown any irreparable injury.

Indeed, even assuming *arguendo*, which is not the case, that all the employees on the old trains leaving from Augusta had been directed to serve on the new train leaving from Camak, and that they all did have to go from Augusta to Camak and back each day, this would still not represent irreparable injury. As the union has conceded such a claim would present nothing more than a time and mileage claim at best and would be clearly compensable, if not under a specific contract clause, then certainly by a monetary damage claim. Against this was balanced the uncontroverted evidence presented by the railroad that its good faith estimate was that it could not comply with the Hours of Service Law by continuing to run the train from Augusta to Macon in one day. The only other solution, if the railroad was not to be allowed to use Camak as an outlying crew terminal, was either to reduce service to the public or, presumably put additional trains on the run, and there was no evidence put on by any party that either equipment or crews were available for such extra service. Under these circumstances, it would seem difficult for the

[1] While we are in the area of might-have-beens, when the case returns to the District Court for serious evidentiary hearings, the railroad fully expects to show that some of the employees on the new train did in fact live in Camak and others of them lived closer to Camak than they did to Augusta.

union to contend that the district court abused its discretion in ruling that no irreparable injury had been shown by the union, and in ruling in effect that the balancing of damage and convenience generally lay against granting the preliminary injunction.

Other than these predominating evidentiary questions the only legal point in question is whether or not the district court properly applied Sections 6 and 10 of the Railway Labor Act. The key wording of Section 10 which is comparable to Section 6, and (which refers to the creation of an emergency board to handle the final step under the Railway Labor Act's procedures for resolving major disputes) provides:

> "After the creation of such board, and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose."[2]

The District Court held that this provision did not apply to this case, and the Court of Appeals affirmed after "a careful examination of the record" in which it found:

> "That there is ample evidence to indicate that the designation of tie-up or layover points as the terminal for assigned crews was not a subject of prior dispute of the union and the railroad but was a matter reserved by practice if not by contract to the railroad. It was therefore not included in the railroad's Section 6 Notice of November, 1969."

In other words, although the § 6 notice did contain within its many paragraphs, representing a supermarket collection of maximum demands, each of which reflected

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[2] Section 10 is significant in this because at the time this dispute arose the work-rules controversy was then before a Presidential Emergency Board, and the thirty day limit had been extended by P.L. 91-541 to expire on March 1, 1971.

the needs of at least one but not necessarily all of the railroads making these coordinated proposals, a phrase broad enough to include moving crew terminals at will the court found that the status quo provisions of the act did not apply because the § 6 notice did not relate to any manner which was in dispute at the time it was served. Alternatively put, the "status quo" on this railroad was that the railroad had the option of moving the terminus of the Macon run as it needed.[3]

In **Shoreline**, this Court considered in depth the legislative history of Sections 6 and 10 of the Railway Labor Act, which conclusively showed that it was only those conditions which were actually in controversy which were to remain in the status quo during negotiations pursuant

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[3] The applicants have continued to confuse the issue between crew and home terminals in a fashion which leads respondents to ponder whether the confusion is not a result of a misunderstanding but a means to an end. The testimony is absolutely clear that "home terminal" is a word of art which designates a point on a railroad from which relief crews and extra men are detailed to fill specific "assigned" jobs. If the unassigned jobs commence at some intermediate point away from the railroad "home terminal" then the men are paid to "dead head" to the assignment and back to the railroad home terminal, which is now Augusta, and always has been Augusta. A "crew terminal" on the other hand, is the place from which an **assigned** or regular crew goes on or off duty. The respondents have labored long and hard over the following words in the notice of January 15, 1971:

"First crew on duty at Camak train No. 31 9:01 A.M., to depart Camak on No. 31's schedule, or extra, Sunday, January 24, 1971, returning on No. 30's schedule, or extra, from Macon to Camak Monday, January 24, 1971 and will operate in this manner thereafter, with layover at Camak on Saturday with Camak being home terminal."

It is the use of the words "home terminal" in this memorandum notice which apparently has enraptured the union's interest in this case, although the railroad's testimony was unequivocal that there was no intention to change the "railroad home terminal"; only an intention to specify that Camak would thereafter be the crew "home terminal." (We are almost embarrassed to burden this Court with such matters, but it is petitioners who continue to argue some significance into these words.)

to a Section 6 notice. See 396 U.S. at 153-54, Notes 19 and 20. Matters which are not in controversy are not limited by the status quo provisions. The lower courts in this case have simply found as a matter of fact that there was no evidence of any controversy concerning the right of the railroad to move the tie-up points for assigned crews, and indeed there was some evidence that at least since the NRAB award mentioned previously, both parties had had a substantial foundation for believing that the railroad did have that right explicitly. Thus, the mere fact that this railroad, as one of a hundred others, filed a broad blanket Section 6 notice neither automatically put the existence of that right in controversy on this railroad, nor did it create any evidentiary presumption that the railroad did not already have the right it sought to put into the contract terms. That is really all there is to this case, and this should hardly warrant the grant of certiorari by this Court.

Even if this Court should wish to take a second look at the concept advanced in **Shoreline**, which we would normally believe might well be warranted, the context of this case hardly presents a structure in which to do so. As indicated previously, the evidence was most hastily presented—the oral evidence taken by the district court, not including colloquy of counsel, does not exceed 45 letter size pages of double space typescript, presented without any pre-trial discovery and with a great deal of wasted effort in getting to matters that were of genuine significance. If there is a serious question here, which respondents genuinely doubt, it can only be satisfactorily considered by this Court after a full evidentiary hearing.

So far we have not touched upon the fact that there has not yet been a definitive resolution of the question, steadfastly maintained by the railroad (contrary to the assertion in the petition) of whether the existing contract with the union held by this railroad actually provides or

reasonably implies that the railroad already has a right under the contract to move the crew terminals. If the railroad does in fact have this contract right (which is not so unreasonable to conceive, bearing in mind that at the time the contract was made the tie-up point was at Camak) the dispute would no longer even be in Court. Of course, under **Slocum v. Delaware, L.&W.R.R.**, 339 U.S. 239, 94 L.Ed. 795 (1950), such a contract interpretation can only be made by the National Railroad Adjustment Board or possibly by the National Mediation Board, and not by the District Court. Thus consideration now by the District Court might well be premature.

CONCLUSION

It is genuinely difficult to conceive why the respondents have brought this case to this Court in its present posture. The meagerness of the record is surpassed only by the paucity of the matters with which the Court would have to deal. All that is sought is a review of evidence taken on an application for a preliminary injunction, upon which the District Court ruled, well within its discretion, that the union had showed no irreparable injury, and further, had not carried its burden of showing that the railroad planned to make a change in working conditions which were presently in dispute between this railroad and this union. This being the case, the petition for certiorari should surely be denied.

Respectfully submitted

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APPENDIX

RAILWAY LABOR ACT, SECTION 2

Seventh. No carrier, its officers, or agents shall change the rates of pay rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

RAILWAY LABOR ACT, SECTION 6

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board. May 20, 1926, c. 347, §6, 44 Stat. 582; June 21, 1934, c. 691, §6, 48 Stat. 1197.

RAILWAY LABOR ACT, SECTION 10

If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this chapter and should, in the judgment of the Mediation Board,

threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: **Provided, however,** That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

There is authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose. May 20, 1926, c. 347, §10, 44 Stat. 586; June 21, 1934, c. 691, §7, 48 Stat. 1197.

PUBLIC LAW 91-541; 84 STAT. 1407

[H.J. Res. 1413]

Joint Resolution to provide for a temporary prohibition of strikes or lockouts with respect to the current railway labor-management dispute.

Whereas the labor dispute between the carriers represented by the National Railway Labor Conference and the Eastern, Western, and Southeastern Carriers Conference Committees and certain of their employees represented by the United Transportation Union, the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (BRAC), the Brotherhood of Maintenance of Way Employees, Hotel and Restaurant Employees and Bartenders International Union threatens essential transportation services of the Nation; and

Whereas it is essential to the national interest, including the national health and defense, that essential transportation services be maintained; and

Whereas all the procedures for resolving such dispute provided for in the Railway Labor Act have been exhausted and have not resulted in settlement of the dispute; and

Whereas the Congress finds that emergency measures are essential to security and continuity of transportation services by such carriers; and

Whereas it is desirable to achieve the objectives in a manner which preserves and prefers solutions reached through collective bargaining; and

Whereas the recommendations of Presidential Emergency Board Numbered 178 for settlement of this dispute did not result in a settlement: Now, therefore, in order to

encourage these parties to reach their own agreement, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That:

The provisions of the final paragraph of section 10 of the Railway Labor Act (45 U.S.C. 160) shall apply and be extended for an additional period with respect to the above dispute, so that no change, except by agreement, shall be made by the carriers represented by the National Railway Labor Conference and the Eastern, Western, and Southeastern Carriers Conference Committees or by their employees, in the conditions out of which such dispute arose prior to 12:01 antemeridian of March 1, 1971.

Sec. 2. Not later than fifteen days prior to the expiration date specified in the first section of this joint resolution the President shall submit to the Congress a full and comprehensive report containing—

(1) the progress, if any, of negotiations between the National Railway Labor Conference and the Eastern, Western, and Southeastern Carriers Conference Committees and their employees; and

(2) any such recommendations for a proposed solution of the dispute described in this joint resolution as he deems appropriate.

Sec. 3. Notwithstanding the first section of this joint resolution, the rates of pay of all employees who are subject to the first section of this resolution shall be increased by 5 percent effective as of January 1, 1970, and by 32 cents per hour effective as of November 1, 1970. Nothing in this section shall prevent any change made by agreement in the increases in rates of pay provided pursuant to this section.

Approved December 10, 1970.